No. 04-312

Supreme Court, U.S.
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In The Supreme Court of the United States

AMERICAN CHIROPRACTIC ASSOCIATION, INCORPORATED, a non-profit corporation, *et al.*,

Petitioners,

v.

TRIGON HEALTHCARE, INCORPORATED, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petitioner, The American Chiropractic Association ("ACA"), provides this brief Reply to address an inaccurate assertion made by Respondent Trigon Healthcare, Inc.[1]

At pages 12 through 16 of its Brief In Opposition, Trigon Healthcare, Inc., *et al.* ("Trigon") inaccurately states that (1) ACA alleged only one antitrust conspiracy and (2) "the conspiracy" was rejected by the lower courts on independent grounds not raised in ACA's Questions Presented in its Petition For Writ Of Certiorari. Each part of Trigon's two-part assertion is false.

ACA Alleged Multiple, Separate Antitrust Conspiracies

ACA alleged multiple antitrust conspiracies. ACA alleged that Trigon conspired (1) with the individual medical doctors on the MCAP, and (2) with the Virginia medical associations and societies that were represented by the medical doctor representatives on the MCAP.

The first conspiracy alleged by ACA and addressed by the lower courts involved the medical doctors on the MCAP in their capacity as individual

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[1] Although Trigon makes several assertions believed to be inaccurate, Petitioner ACA addresses only one herein, because that one was not explicitly addressed in ACA's Petition For Writ Of Certiorari or by any amici, and requires prompt correction.

doctors. The Fourth Circuit explicitly recognized that ACA alleged a conspiracy between Trigon and the individual doctors on the MCAP:

> We consider first American Chiropractic's argument that Trigon conspired with medical doctors who served on the MCAP.

(App. 13a).

A second, separate conspiracy alleged by ACA was also addressed by the lower courts. ACA alleged that Trigon separately conspired with the various Virginia medical associations and societies ("medical associations"). The Fourth Circuit directly acknowledged this second, separate conspiracy when it stated:

> American Chiropractic next argues, assuming that the MCAP did not conspire with Trigon, that the medical associations who placed their members on the MCAP conspired with Trigon to publish the allegedly misleading guidelines and to implement several coverage policies aimed at limiting the usage and reimbursement of chiropractic services.

(App. 19a); (*see also* App. 62a-114a (Third Amended Complaint); and App. 13a-22a (Fourth Circuit Decision describing the multiple alleged conspiracies)). Thus, the initial premise underlying Trigon's entire argument

is faulty because the record shows that ACA alleged that Trigon engaged in multiple antitrust conspiracies.

Summary Judgment Was Granted As To Both Conspiracies Based On The Improper Extension of *Copperweld*

The second prong of Trigon's false assertion, that the lower courts rejected ACA's alleged conspiracies on independent grounds not raised in ACA's Questions Presented in its Petition For Writ Of Certiorari, is equally faulty. The lower courts rejected each separate conspiracy alleged by ACA by improperly concluding that the medical doctors on the MCAP were "agents" of Trigon under *Copperweld*.

The Fourth Circuit granted summary judgment on the first conspiracy, stating:

> [W]e look to whether the medical doctors, in their role as members of the MCAP, share a unity of interest with Trigon that makes them corporate agents of Trigon. We believe that they do.

(App. 17a).

The improper extension of *Copperweld* was also the basis for the lower courts' summary rejections of ACA's second asserted conspiracy between Trigon and the medical associations. The Fourth Circuit, in view of its first finding that the doctors were "corporate agents of Trigon," could not treat the doctors as representatives or agents of the medical associations. Thus, the court relied on an inapposite antitrust case,

and incorrectly viewed the doctors merely as members of the medical associations, stating:

> At most, the MCAP meeting shows contact between two independent economic actors, but mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence of an anticompetitive conspiracy. *Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278, 281 (4th Cir. 1986).

(App. 21a).[2] Yet, ACA asserted, and the record evidence shows, that the medical doctors on the MCAP were "appointed by" the medical associations, and represented the interests of the medical associations. (App. 1103a - 1104a).[3] The Fourth Circuit thus concluded (wrongly) that, because the medical doctors were "agents" of Trigon, summary judgment was also appropriate as to the second separate conspiracy alleged by ACA. (*See* App. 13a-22a).

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[2] The Fourth Circuit's reliance on *Cooper* is illustrative of its misunderstanding of antitrust law generally, and the alleged conspiracies specifically. *Cooper* is a case in which the evidence showed that medical doctors at a peer review committee meeting were simply members, not representatives, of a medical association. (*See Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278 (4th Cir. 1986)).

[3] ACA's Petition (and Questions Presented) also challenge the underlying issue that the Fourth Circuit completely ignored the evidence presented (*see* Petition, at i and 16-18) showing that the medical doctors representing the Virginia medical societies on the MCAP were not employees or agents of Trigon. That is part and parcel of the fundamental *Copperweld* issue.

Conclusion

Trigon's argument, that the ACA alleged only one conspiracy, and that the Fourth Circuit rejected it on multiple independent grounds, is false. The Fourth Circuit recognized and summarily ruled on two separate conspiracies alleged by ACA. The Fourth Circuit rejected ACA's first alleged conspiracy based on the grounds that the medical doctors were agents of Trigon under *Copperweld*, and were therefore incapable of conspiring with Trigon. This conclusion then formed the basis for the Fourth Circuit's rejection of the second conspiracy alleged by ACA because, as agents of Trigon, the medical doctors could not be agents of the medical associations as well.

ACA's Petition For Certiorari should be granted because it presents extremely significant issues to the healthcare industry in this country, and is dispositive with respect to each conspiracy alleged in this case.

Respectfully submitted,

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